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February 7, 2002

DEPT OF TRANSPORTATION
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BY COURIER

Docket Management System
U.S. Dept of Transportation
Room PL-401,
499 Seventh Street SW
Washington D.C.
20590-0001

Dear Sir/Madam

Re: Docket Number FRA 2001-8728, Notice Number 1, 49 CFR Part 241, RIN 2130-AB38, U.S. Locational Requirement for Dispatching of U.S. Rail Operations

Canadian National (CN) wishes to provide the following comments on the Interim Final Rule and Request for Comments as published in the December 11, 2001 Federal Register.

Canadian National is North America's fifth largest railroad with 18,300 route miles and 24,700 employees in Canada and the U.S. It operates the largest rail network in Canada and the only transcontinental network in North America. CN has operations in eight Canadian provinces and 14 U.S. states. In 1999 CN carried out an extremely successful integration with Illinois Central. It is currently implementing a similar integration with Wisconsin Central.

Safety is a core value at CN and the railroad has long been recognized as one of the safest railroads in North America. CN's many safety programs span our entire system on both sides of the border, a situation which has been enhanced through the best practice integration associated with the recent IC and current WC transactions.

The Canadian railroad industry has a safety record that is equal to if not better than that of its U.S. counterparts. This is due to a combination of company based safety programs and initiatives and Canadian federal railroad safety legislation, including aspects such as medical rules and safety management systems that are not covered by equivalent regulation in the U.S.

Notwithstanding this, CN does recognize the FRA's need to ensure the safety and security of all US railroad operations including those dispatched from foreign countries such as Canada. We believe that this can be accomplished without the need for prescriptive regulation, but are pleased to note that the interim final regulation recognizes that there must be flexibility to account for emergency situations as well as existing low risk operations and other situations of limited risk such as bridge or handoff situations. CN strongly urges that this flexibility be maintained in any ultimate final rule.

In addition, although CN has no plans at this time to dispatch additional portions of its US operations from Canada, CN believes that it must retain this flexibility for the future. As such, CN feels that it is essential that any ultimate regulation must provide for the flexibility to operate additional line segments from a foreign country as long as equivalent safety programs are in effect and other concerns are adequately addressed.

In addition to these general comments, CN also wishes to make the following comments on specific aspects of the interim rule and request for comment.

Existing CN Operations

In Section II of the preamble to the interim rule, FRA refers to three existing situations on the CN system where US track is dispatched from Canada. These are (with corrected mileages):

- Windsor, Ontario to Detroit, Michigan (1.8 miles) – dispatched from Toronto, Ontario

- Sarnia, Ontario to Tappan (Port Huron), Michigan (3.1 miles) – dispatched from Toronto, Ontario
- Baudette, Minnesota to International Boundary, Minnesota (43.8 miles of Sprague subdivision) – dispatched from Edmonton, Alta.

CN wishes to advise FRA that there is a fourth location that was not referred to in the notice. This is a 0.3 mile section from the International border at Fort Erie, Ontario to Harbour Draw near Buffalo, NY, which is dispatched from CN's Toronto dispatching center. This very small section of track has been dispatched by CN from Canada for many years with no safety problems. As such, CN would expect that this also be included in the rule's "grandfather" clause.

The preamble also indicates that CN has a number of locations where the Canadian railroad operates into the U.S. for very short distance without the use of a dispatcher. CN wishes to inform FRA that, in addition to the two locations identified in the notice (.3 miles from Harbour Draw to Black Rock in Buffalo, N.Y. and .34 miles to Niagara Falls, N.Y. (note corrected distances for each), there is a third location from the Canadian – U.S. border to Rouses Point, N.Y (1.2 miles) that would fall into this category.

Footnote 3 in this section also makes reference to CN's 1998 alliance with the Kansas City Southern Railroad. Although not specifically stated, it is assumed that this has been raised as an example of a possible additional situation that may come under foreign-based dispatching. If so, this is totally unfounded. As CN and IC had explained to FRA on a number of occasions during the development of the safety integration plan for the 1999 merger between the railroads, the KCS alliance is solely a marketing agreement that does not in any way extend to the operations of the two railroads.

Regulatory Oversight

In Section IV of the preamble to the interim rule, FRA suggests that there may be situations where foreign-based dispatching could fall within a regulatory vacuum. To this point, the notice states "First, although dispatching can be performed from any country in the world, not every country in the world has an entity that regulates rail transportation safety. Second, even if the host country has established a transportation regulatory entity, that entity may well lack full safety jurisdiction over the railroad operations in the United States that are being dispatched from the host country."

Although this could conceivably be the case in some countries, it is not applicable in Canada where a combination of Transport Canada and Human Resources Development Canada – Labour (HRDC) regulate the safety of any train dispatcher located in Canada. This would include safety protection under the Canada Labour Code including the requirement for Health and Safety Committee representation.

Included in this Canadian federal railroad legislation are items that far exceed comparable requirements in the United States. For instance, Transport Canada's new Railway Medical Rules for Safety Critical Employees (which include train dispatchers) provide for detailed medical assessments every 3 to 5 years depending on age, and are supported by extensive medical standards covering a wide variety of conditions including vision, hearing, substance abuse, diabetes epilepsy, cardio-vascular and other physical and mental disorders. These standards were developed by medical experts in each respective field and are tailored to the specifics of railroad operations. The rules also require an employee's personal physician to notify the railroad's Chief Medical Officer of any condition that may impair one's ability to perform their job safely.

In addition, Transport Canada's Safety Management Systems (SMS) regulation, which was enacted in 2001, requires all Canadian federally regulated railroads to develop a comprehensive plan and associated processes to address safety including corporate

safety culture, responsibilities, communications, performance targets and monitoring, safety auditing and risk assessments. The SMS regulation also requires that railroads establish a formal risk assessment protocol and conduct a risk assessment for any significant change in operations. There is no comparable regulatory requirement in the U.S.

As such, CN believes that it's Canadian-based dispatching operations are every bit as safe and secure as those in the U.S. FRA should not penalize those railroads that operate from countries with full regulatory oversight so as to address the few potential situations in countries that may pose a risk.

CN also questions why FRA feels that they cannot perform certain aspects of their regular inspection and enforcement activities such as safety advisories, site inspections and SACP for foreign-based dispatchers. In the last paragraph of section III of the preamble, FRA states "Such tools as SACP activities, railroad site visits and emergency orders depend, to a significant degree, on easy access to railroad facilities. For these tools to work, FRA must be assured of such access. FRA is not certain at this time whether access can be assured outside the borders of the United States."

Certainly CN has always been cooperative with regulatory agencies on either side of the border and would not object to access for site visits or other discussions pertaining to safety of dispatching operations. This would seem to be a much more reasonable means of addressing any specific safety concerns associated with a particular foreign-based dispatching situation than a wide spanning regulation.

Drug and Alcohol Testing

One of the concerns expressed by FRA is the lack of regulated drug and alcohol testing for dispatchers in foreign countries. CN has commented on this issue at large in our comments on the NPRM concerning the proposed expansion of all aspects of 49 CFR

Part 219 to foreign based dispatchers and train crews who control track or operate in the United States. (Docket No. FRA-2001-11068, Notice No. 1)

As indicated in those comments, although D&A testing is not regulated in Canada, CN has conducted pre-employment drug testing for employees entering into safety sensitive positions (including train dispatchers) since the mid 1980s. In addition, in 1997 CN implemented a comprehensive drug and alcohol policy and program for its Canadian operation that includes testing for:

- Pre-employment for specified risk-sensitive positions including train dispatchers (drug only)
- Pre-assignment to a risk sensitive position
- Reasonable Cause
- Return to service/follow-up (post-treatment)

Revisions to the policy planned for 2002 will add mandatory post-accident testing using criteria identical to that of the FRA.

CN's Canadian drug and alcohol program also provides for employee self referral and co-worker report programs similar to that which would be required under the expanded scope of 49 CFR Part 219.

The CN policy for Canadian operations does not include random testing due to the Canadian legal climate and specifically the Canadian Human Rights Act which has ruled in the past that random drug testing is prohibited, even for safety-sensitive positions. Furthermore random drug testing has been historically prohibited under Canadian railway labour arbitration jurisprudence. Although this may have been modified by a recent Court of Appeal decision, it has not been tested in the railway context. For this reason, there remain considerable questions regarding the legal status of random drug and even alcohol testing in Canada.

CN has long argued for drug and alcohol legislation which would include random testing for safety sensitive positions in Canada and, as noted in our comments on the NPRM, continues to urge FRA to work with Transport Canada to develop common drug and alcohol legislation that would help further the safety of operations on both sides of the border while reducing the problems that CN would face in the way of potential cost and challenges associated with unilateral FRA legislation affecting Canadian-based employees.

As previously mentioned, it should also be noted that Canada's new Railway Medical Rules provide for full medical assessments for train dispatchers every 3 to 5 years depending on age. This assessment would include substance abuse related issues. The Canadian Railway Safety Act also requires any physician examining or treating a person in a railroad safety critical position such as train dispatcher to report any medical concerns to the railway's Chief Medical Officer.

Hours of Service

FRA is also concerned that foreign countries may not have legislated requirements for hours of service of train dispatchers.

Although it is correct that Canadian-based train dispatchers are not specifically covered by Transport Canada hour of service rules, it must be noted that CN has, through a combination of collective agreements with associated labor organizations and company policy, established specific requirements for maximum hours of service for train dispatchers. This requires that train dispatchers work no more than 8 hours on a normal assignment with the ability to work up to 12 hours where required to fill in for vacations, etc. The 12 hour maximum is consistent with FRA and Transport Canada hours of service requirements for train crews and is deemed to be a safe practice.

As such, although not regulated by federal law, CN believes that it has sufficient standards in place to sufficiently address this issue.

Efficiency Testing

FRA is concerned that foreign-based train dispatchers may not be covered by the same efficiency test requirements as those based in the U.S.

Although Transport Canada does not have federal regulations governing efficiency testing, CN has established an extensive efficiency test program for many of its Canadian-based employees including train dispatchers. This program, known as Performance Monitoring and Rule Compliance (PMRC) is virtually identical to the US requirements, which CN uses for its U.S.-based dispatching offices.

As such, CN believes that it fully addresses this concern.

Security Issues

In section VI of the preamble to the Interim Final Rule, FRA raises concerns over security measures at foreign dispatching centers. As part of this section they state "FRA does not know at this time, whether foreign railroads employ security measures comparable to those of United States railroads or whether foreign governments have enforceable security requirements that would effectively protect dispatch facilities."

CN wishes to advise FRA that the security measures for its Canadian operations, including Dispatching centers, are fully comparable to those for its US operations. CN is every bit as concerned about safety and security as the FRA and the entire North American rail industry. We have worked with AAR and FRA on many task forces to review security issues in light of September 11, 2001 and have taken measures to increase security on both sides of the border. CN dispatching offices in Canada and the U.S.

make use of card readers and monitored security cameras to help ensure security. Dedicated security personnel have also been assigned to the centers during periods of heightened awareness.

It must also be noted that CN has a dedicated police department in both Canada and the United States, which play a major role in ensuring the security of its operations and installations. CN is also an active member of the North American Association of Railroad Chiefs of Police and has established close contacts with the intelligence unit of the Canadian RCMP and other external police organizations to ensure the sharing of information pertaining to security issues.

CN also works closely with the Security and Emergency Preparedness section of Transport Canada and is part of the Memorandum of Understanding between this group and the Railway Association of Canada, which requires Canadian railroads to have Security Plans and to perform regular security exercises.

As such, CN believes that it can fully address any concerns that FRA may have in this area.

Language Differences/Terminology

In Section VII of the preamble to the interim rule, FRA raises concerns over possible safety issues related to the use of different languages or terminologies in foreign countries.

Although CN recognizes that this could be a potential situation that would need to be addressed in some countries, the problem does not exist in CN's dispatching of U.S. territory from Canada. Although CN does conduct some operations in French in the Province of Quebec, any dispatching of track in the U.S. would be designated as an entirely English operation and fully dispatched in English.

In addition, through the necessity of operating in an ever expanding cross-border North American railroad environment, CN and the entire Canadian railroad industry uses virtually identical terminology to those in the US, with the very few minor differences being confined to non-safety related items (and being no more common than terminology differences from individual railroad to railroad).

As such, CN does not see this as being a concern with respect to its operations.

Units of Measure

In section VIII of the preamble to the interim rule, FRA raises concerns associated with the use of the metric system in countries such as Canada. These particularly relate to safety sensitive measures such as distance, speed and location.

Much as previously discussed with respect to terminology, CN wishes to advise FRA that, due to the nature of North American railroad industry, CN and other Canadian railroads that operate into the US, continue to use English (or Imperial) units for all aspects of railroad operations including distance, speed and location.

As such, CN does not see this as being a concern with respect to its operations.

Work Disruptions

As part of the "Other Concerns" discussed in section IX of the preamble to the interim rule, FRA raises concerns over potential impact of labor related work stoppages (such as strikes) in foreign countries affecting U.S. rail operations. They note that U.S.-based dispatchers are typically unionized employees subject to the Railway Labor Act, which prohibits strikes over contract interpretation. They also note that Congress has the power to legislate an end to a strike by U.S. railroad employees but cannot address foreign-based dispatchers.

Although this is technically correct, it must be noted that Canada, under the Canada Labour Code has similar strike protection in place and that the Canadian parliament also has the ability to enact "back to work" legislation.

Furthermore, it should be noted that CN has contingency plans for any labor disruption, including those involving train dispatchers, which would include continued operation using supervisory personnel or the transfer of dispatching operations to an alternate location.

As such, CN believes that it has sufficient safeguards in place to address these concerns.

Options

In section X of the preamble to the interim rule, FRA outlines the options that it feels it has to address their concerns over foreign-based dispatching of U.S. track. In short, these are (1) to bar extraterritorial dispatching with minor exceptions or (2) to permit extraterritorial dispatching as long as such dispatchers are subject to the same safety standards as for those dispatchers in the U.S and that all additional concerns are adequately addressed. FRA has chosen the former of these, which is reflected in the interim rule.

As previously stated, CN believes that any specific problems associated with foreign-based dispatching can best be addressed with specific discussions between FRA and the railroad involved and if necessary, through emergency orders, rather than through regulation that paints all foreign-based situations with the same brush. FRA itself acknowledges in the preamble that the existing situations have not led to problems.

Notwithstanding this view, should FRA continue to be of the opinion that it must protect itself with regulation, CN strongly believes that such must exempt minor "low risk" operations such as those in place today. To require full equivalent programs for these

situations would result in unnecessary effort and expense on behalf of the railroads involved, despite the fact that FRA has acknowledged that these locations are low risk and have not presented problems in the many years that they have already been in effect.

Definition of "Dispatch"

CN is concerned that the definition of "dispatch" contained in the actual interim rule could be interpreted to include much more than intended. For instance, it is noted that the "Section by Section Analysis" in the preamble to the rule states "although FRA specifically mentions yardmasters under the definition of dispatcher, FRA does not intend for this rule to cover yardmasters as a job category. Instead, yardmasters are only covered by this part when they are performing dispatching functions."

Unfortunately the published rule itself will not have this background interpretation which could, over time, lead to more literal interpretations. CN suggests that the definition be modified to better convey the intent of the word "dispatch".

Criteria for Exemption

Although CN agrees that, should a regulation be deemed necessary, it must include exemptions for low risk operations, CN is concerned that the stated criteria for exemption is overly restrictive and not representative of the potential risks involved.

In addition to grandfathering those situations in place in December 1999, the interim rule would exempt low risk bridge or handoff operations. Stated criteria as contained in the interim rule is as follows:

For "Bridge" situations:

- Must not exceed 100 miles, and;
-

- Under control of the same assigned crew over entire trip, and;
- Train movements both originate and terminate in the foreign country without pick up, set off or interchange of cars.

For "Handoff" situations:

- Must not exceed 100 miles, and;
- Under control of the same assigned crew over entire trip, and;
- Under exclusive control of a single dispatching desk, and;
- Must not proceed beyond first of any of the following locations:
 - Interchange point
 - Signal control point
 - Junction of two or more rail lines
 - Established crew change point
 - Yard or yard limits location
 - Inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture or other government inspection
 - Location of change in train control

Although CN can agree with the 100 mile limit and requirement to be under control of single assigned crew and single dispatching desk, the Railroad is concerned that the requirement for no setoffs or pickups in the case of bridge lines and the list of locations beyond which the exemption cannot extend for handoff situations, is extremely restrictive to the point of being unmanageable. It is also not representative of the suggested risks associated with foreign-based dispatching.

To highlight this point, it is noted that, even though FRA acknowledges that CN's existing Canadian-based dispatching operations have not presented problems in the past and are of minimal risk, few would fall under the very restrictive criteria allowed for exemption.

In the case of bridge traffic, the number of lines of less than 100 miles that both originate and terminate in the same foreign country would immediately limit the potential for use of this exemption. To further restrict it to exclude operations where cars may be setoff, pick-up or interchanged would seem to be unnecessary, particularly when the train dispatcher plays a minimal role in these activities. CN's Sprague subdivision operation does involve the occasional planned setoff or pickup in the US, a situation which has not presented any problems in its long history. Such activities are closely coordinated with U.S. Customs.

In the case of the "handoff" operations, the vast list of location types that would limit the extent of foreign-based dispatching will result in the allowable segment being unmanageably restricted. To not be allowed beyond an inspection point, yard limit, signal control point or interchange does not provide the necessary length of segment to proceed to a reasonable handoff point and is overly restrictive in comparison to the minimal risk involved and the role of the train dispatcher. It is suggested that a more reasonable approach would be to allow handoffs to proceed to a crew change point or a change in traffic control method (not including yard limits) with a limit of 15 miles. Alternative locations could also be used if agreed to and filed with FRA

Date of Termination of Interim Final Rule

CN notes that there is a discrepancy in the date of termination of the Interim Final Rule. The Summary and Dates sections at the beginning of the Notice in the Federal Register state that the rule will take effect on January 10, 2002 and that the "Interim Final Rule will be in effect for a period of 365 days" while towards the end of Section X it is stated that "The Interim Final Rule will terminate on December 11, 2002 unless FRA takes further action to extend the sunset date." This needs to be clarified.

Economic Impact

The notice suggests that the economic impact of the rule will be minimal. In section XIII, it states in part "FRA expects that overall the rule will not impose a significant cost to the rail industry over the next twenty years". The analysis, in fact, seems to suggest that the net present value of costs over the first 20 years would show a savings due to the avoidance of severance costs.

CN suggests that such a statement cannot be made in light of the many unknown factors associated with the ultimate final rule. For instance, the preamble leaves open potential scenarios such as eliminating the grandfathering aspects and the exemptions for hand-off and bridge operations provided in the interim rule. This would significantly increase the costs to railroads such as CN well beyond those stated in this section of the interim rule without providing any perceivable benefit. Even if these aspects of the interim rule are retained, CN suggests that the stated costs do not accurately portray the potential additional costs of adding FRA equivalent programs or the loss of potential economies of scale associated with the loss of flexibility in dispatching operations for an international railroad such as CN.

The notice goes on to state, "FRA believes that it is reasonable to expect that several injuries and fatalities will be avoided as a result of implementing this interim final rule. FRA also believes that the safety of rail operations will be compromised if this rule is not implemented". CN totally disagrees with this statement and challenges the FRA to support it with factual data.

In reviewing the detailed economic analysis prepared by FRA in support of the rule, we cannot find any specific evidence supporting claims of a likely increase in accidents or injuries. There is only subjective text on the value of US regulatory requirements and examples of accidents involving US operations that took place despite these regulatory safeguards. The economic analysis also includes tables showing that a significant

percentage of accidents (approx. 30-36%) are caused by human error but fail to point out that the vast majority of these are caused by human error on the part of train crews and do not involve the train dispatcher in any manner.

It is also noted that no mention is made of the safety-checks built into modern dispatching systems to reduce the occurrence of human error. In addition, no mention is made of the potential benefit of Canadian regulatory requirements (such as Medical Rules and Safety Management System regulations) for dispatching operations that exceed those in the U.S.

As previously stated, railroads such as CN have placed major importance on ensuring the safety of operations on both sides of the border. CN's history with regards to safety in general and specifically with respect to its Canadian-based dispatching operations show no evidence of safety concerns. This does not support the interim rule's claim of increased accidents and injuries.

CN also notes an apparent inconsistency between the FRA's projections of future expansion of foreign-based dispatching in this economic analysis and that for the NPRM on expansion of drug and alcohol testing. In the document prepared for the this interim rule, FRA states that "In the absence of this rulemaking, over the next twenty years, certain train movements in the United States would likely be dispatched from Canada." The analysis then assumes 5 dispatcher positions to be immediately relocated and another 20 positions within three years and 50 in seven years.

Contrasting with this aggressive estimate of the potential for relocation of dispatching operations, is the economic document prepared for the NPRM on expansion of drug and alcohol testing to foreign-based employees, which states in part "Since FRA is not aware of any FRFB dispatchers currently performing dispatching functions in the United States or of any specific plans to have FRFB employees perform dispatching functions in the United States in the future, FRA does not expect any additional costs or benefits over the

next twenty years as a result of expanding the applicability of Part 219 to FRFB dispatchers." As such there would seem to be some inconsistency over the potential expansion of foreign-based dispatching and, by extension, over the need for this rule.

Conclusion

In summary, CN wishes to impress upon FRA that the railroad has first class safety programs in place for all of its operations including its train dispatchers on both sides of the border.

Although Canadian legislation may differ from US requirements in a number of areas, CN has safety programs and practices for its Canadian-based dispatchers that provide a comparable level of safety to that required by FRA for U.S. operations. In fact, in some areas, such as Medical Rules and Safety Management System regulations, Transport Canada and CN's requirements exceed those of U.S. regulations.

Notwithstanding this, CN does recognize FRA's concerns as they apply to foreign-based dispatching in general and FRA's need to ensure the safety of U.S. operations. CN believes that this can best be accomplished by reviewing individual situations with the specific railroads involved and developing the necessary plans to address legitimate safety concerns. CN also notes that FRA still has the power to issue emergency orders where such discussions cannot alleviate the concerns.

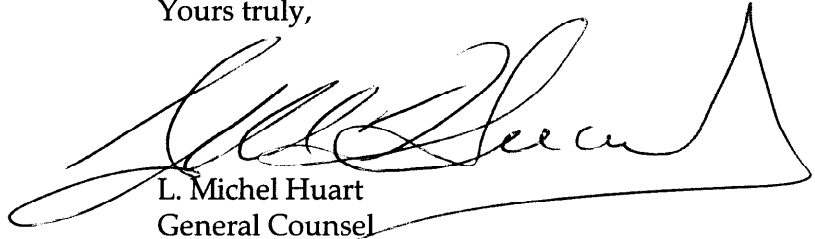
With regards to the interim rule, CN is pleased to note that FRA acknowledges the minor nature of existing operations and has grandfathered these. We are also pleased that the need for emergency provisions is recognized.

Should FRA continue to be of the opinion that the potential risks can only be addressed through regulation, we strongly urge that any final rule retain these grandfather and emergency provisions. CN also urges FRA to review the criteria for handoff and bridge

situations and revise them to be more reflective of actual operations of this nature, the role of the train dispatcher and the true risks involved. Finally, CN asks FRA to ensure that any final rule provide the flexibility to allow for larger scale foreign-based dispatching operations when a railroad can establish an equivalent level of safety and security to that afforded by regulatory regimes in the U.S.

CN will be attending the public hearing and will be represented on that occasion by Karen Phillips, Vice-President, U.S. Government Affairs, Don Watts, Director, Regulatory Affairs and Tom Thompson, System Manager, Operating Practices.

Yours truly,



L. Michel Huart
General Counsel